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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HUGH DEADWYLER, *et al.*,

Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC.; and
VOLKSWAGEN AG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Beverly C. Moore, Jr.
Sandra B. Brantley
Moore & Brown
4900 Massachusetts Ave., N.W.
Suite 205
Washington, D.C. 20016
(202) 364-1032

B. Ervin Brown, II
Moore & Brown
240 Branch Bank & Trust Bldg.
8 West Third Street
Winston-Salem, N.C. 27101
(919) 723-7966

Charles R. Watkins
Sachnoff & Weaver
30 S. Wacker Drive
Chicago, Illinois 60606
(312) 207-6480

Attorneys for Petitioners

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTION PRESENTED FOR REVIEW*

Whether, in a nationwide implied warranty of merchantability class action alleging that many of some 300,000 Volkswagen Rabbit automobiles were unfit for their ordinary purposes on account of excessive oil consumption and consequent costly engine seizures, the Court of Appeals erred in holding that during the trial plaintiffs did not make sufficiently "clear", in the meaning of Fed. R. Civ. P. 51 read in conjunction with Fed. R. Civ. P. 46, their objections to special jury interrogatories that improperly required the jury to find that certain "polyacrylate valve stem seals" were "defectively designed", before being permitted to reach the basic issue of unmerchantability/unfitness, when plaintiffs in fact timely submitted an extensively documented alternative set of written jury instructions and special jury interrogatories not requiring proof of any specific "defect", urged their adoption in *three* separate colloquys with the trial judge prior to the jury's retiring, and properly concluded at that point that further objections would have been futile.

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* In addition to the named petitioner Hugh Deadwyler, the other petitioners include the other 163 plaintiffs who are listed in the caption of the District Court's Judgment, 19a-20a. The one corporate plaintiff, Banwell, White & Arnold, Inc., has no parent or subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOUTTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 884 F.2d 779 and is reproduced in the Appendix bound with this volume at 3a-17a. The Court of Appeals denied Petitioners'/Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc, and modified the opinion to correct various typographical errors, by unreported Order filed September 28, 1989, which is reproduced at 1a-2a. The unreported Judgment of the United States District Court for the Western District of North Carolina, filed November 12, 1987, is reproduced at 19a-26a.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1989 (18a) and reaffirmed by the denial of a timely petition for

rehearing on September 28, 1989 (1a-2a). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES AT ISSUE

The Magnuson-Moss Warranty—Federal Trade Commission Improvements Act ("the Magnuson-Moss Act"), 15 U.S.C. §2310(d)(1), provides that "a consumer who is damaged by the failure of a supplier [or] warrantor to comply with any obligation under...[an] implied warranty...may bring suit for damages...." An "implied warranty" is defined in 15 U.S.C. §2301(7) as "an implied warranty arising under state law...." The state law definition of "implied warranty" relevant here is codified in Uniform Commercial Code ("UCC") §2-314(2)(c), which provides that goods to be merchantable must be "fit for the ordinary purposes for which such goods are used."

Rule 46, Fed. R. Civ. P., provides in pertinent part:

> Formal exceptions to rulings or orders of the court are unnecessary; ...it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor....

Rule 51, Fed. R. Civ. P., provides in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests....No party may assign as error the

giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

STATEMENT OF THE CASE

1. *Facts*

This case is a nationwide class action brought under the Magnuson-Moss Act, 15 U.S.C. §§2301 *et seq.*, alleging that Volkswagen AG, the manufacturer, and Volkswagen of America, Inc., its domestic subsidiary, breached the implied warranty of merchantability with respect to over 300,000 1976-1979 model year Volkswagen Rabbits. Plaintiffs alleged that, relative to similar cars, these VW Rabbits experienced an extraordinarily high rate of excessive oil consumption. The resulting lack or insufficiency of lubricating oil caused many thousands of very expensive-to-repair engine "seizures". Those Rabbits actually experiencing these mechanical deficiencies, plaintiffs alleged, were "unfit for their ordinary purposes" in the meaning of UCC §2-314(2)(c) and thus in breach of the implied warranty of merchantability. Plaintiffs and their class sought to recover, among other damage elements not relevant here, their out-of-pocket expenses for the excess oil consumption and repairs of the related catastrophic engine failures.

As discussed below, the case ended with a special jury interrogatory verdict against the plaintiff class on a "specific defect" issue which, with little doubt, plaintiffs were not legally required to prove as part of their case. The particular question raised by this Petition is whether plaintiffs made sufficiently clear their objection to the improper jury issue that ended the trial. Although Rule 51, Fed. R. Civ. P., clearly requires that such objections to jury instructions be made, Rule 46 dispenses with the requirement of formal exceptions and requires only that a party make his contrary position sufficiently clear to permit judicial correction of error before the jury retires.

From the outset, plaintiffs' primary method of proving classwide unmerchantability was through *statistical evidence of extraordinarily high Rabbit excessive oil consumption rates*, as compared with other similar cars. In other words, what made these cars unfit for their ordinary purposes was the fact of their excessive oil consumption and related engine seizures. Obviously some mechanical design or materials "defect", in particular the polyacrylate valve stem seals discussed below, must have been the underlying cause of this excessive oil consumption, but what *legally* made these Rabbits unfit

for their ordinary purposes (and thus unmerchantable) was their excessive oil consumption, not the "defective" seals themselves.

More specifically, plaintiffs relied throughout on the following data derived from surveys conducted by the Rogers National Research Corporation, obtained through discovery from VW, which showed the following:

PERCENTAGE OF OWNERS REPORTING
EXCESSIVE OIL CONSUMPTION

Model Year	Year 1	Year 2	Year 3	Year 4	Year 5
1975 Rabbits	--	--	12	25	29
1975 Imports	--	--	5	8	10
1976 Rabbits	--	4	9	12	21
1976 Imports	--	2	4	4	6
1977 Rabbits	2	3	15	25	38
1977 Imports	1	2	4	6	8
1978 Rabbits	0	1	11	23	35
1978 Imports	2	1	3	4	7
1979 Rabbits	1	3	17	33	--
1979 Imports	1	1	4	4	--

This evidence was admitted at trial, where three expert witnesses testified for plaintiffs concerning these statistics and their reliability, which defendants never seriously disputed.

Plaintiffs could have rested their case on such statistical proof of "unfitness" alone. But they sought to *bolster* that *statistical* evidence with a *mechanical* defect theory that the excessive oil consumption was caused in part by the hardening and cracking over time of the polyacrylate valve stem seals (later replaced by VW with more

durable "Viton" seals), which enabled engine oil to leak into the combustion chamber and burn with the gasoline. At virtually every point in their pleadings and class certification briefs, however, these two statistical and mechanical theories were referred to disjunctively as different perspectives on the same phenomenon—i.e., the deteriorating seals explaining the excessive oil consumption statistics.

The primacy of plaintiffs' statistical proof over their secondary seal theory was reflected in the briefing on whether "state law variations" in what constituted a breach of implied warranty would defeat the requirement that common issues of law predominate for class certification under Rule 23(b)(3), Fed. R. Civ. P. *See Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012-1014 (D.C. Cir. 1986). Defendants took the position that one such "variation" was that some states require proof of a specific causative defect. Plaintiffs took the contrary position that the definition of an implied warranty breach was uniform in all states, requiring proof only that the product by virtue of its *performance* deficiency was unfit for its ordinary purposes. In support of this universally accepted proposition—that breach is established merely by proof that the product did not perform as warranted—plaintiffs cited voluminous case law authority from the

various states.[1] The District Court's class certification orders themselves defined the class claims as excessive oil

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[1] *E.g.*, *Arizona*: Dietz v. Waller, 685 P.2d 744, 747-749 (Ariz. 1984) (defendant could be held liable under either strict tort liability or implied warranty of merchantability theory despite the absence of direct evidence that the boat was defective, since there was circumstantial evidence from which it could be inferred that the boat was defective at the time it was sold); *Delaware*: Towe v. Justis Bros., 290 A.2d 657, 658 (Del. Super. Ct. 1972) (Although "some evidence of the existence of a defect at the time of delivery is an essential element of a cause of action for breach of the implied warranty of merchantability", "[i]t does not follow...that the plaintiffs [sic] failure to spell out all of the details of their cause of action requires a dismissal" of their complaint. "It is conceivable that a defect existed in the refrigerator at the time of delivery and remained latent until manifested by the occurrence of the fire. It is possible that an expert will so testify. Furthermore, the trier of fact may decide that an unusual failure of mechanical origin is evidence of a defective condition at the time of assembly without further proof of the specific defect in design or assembly."); *District of Columbia*: Stewart v. Ford Motor Co., 553 F.2d 130, 136 (D.C. Cir. 1977); Hall v. General Motors Corp., 647 F.2d 175, 178 (D.C. Cir. 1980); *Florida*: McCarthy v. Florida Ladder Co., 295 So. 2d 707, 709 (Fla. App. 1974) (Plaintiff in an implied warranty action is not required to demonstrate the existence of a specific defect. Rather, "a defect can be inferred from the fact that a new product performs in such a manner as to preclude any other reasonable inference which would suggest that the product was not defective."); Matter of Vincent, 10 B. Rep. 549, 552 (M.D. Fla.1981) ("[w]hile it is true that a buyer of goods may recover on a claim for breach of implied warranty by proving the breach through direct or circumstantial evidence and it is not necessary to produce evidence by a qualified expert, it is clear that the buyer has a burden to show that there are existing circumstances which tend to exclude all reasonable inferences except defectiveness"); *Georgia*: Chrysler Corp. v. Wilson Plumbing Co., 208 S.E.2d 321, 325 (Ga. App. 1974) (where automobile suffered "numerous" breakdowns, the "evidence was sufficient to authorize a finding that...the original occurrence down to the final breakdown was due to a defect never remedied, and would authorize the recovery even under the express or an implied warranty"); *Idaho*: Dickerson v. Mountain View Equip. Co., 710 P.2d 621, 626 (Idaho App. 1985) ("Although the existence of a defect normally supports the finding of a breach of an implied warranty of merchantability..., such a requirement may unduly restrict the examination of a product's merchantability. A product may be

nondefective and nonetheless be unmerchantable." *Illinois*: Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc., 216 N.E.2d 282, 287 (Ill. App. 1966) (allegations that air conditioning "units leaked water or other liquids..., they failed to operate in regular and dependable fashion and required constant servicing, and that they leaked cold air so that it was necessary to remove outside louvers and block up the exterior vents" provided a sufficient basis for the claim of breach of implied warranty of merchantability, and it was not necessary for the plaintiff "to specify further in his complaint as to the causes of these defects"); Burrus v. Itek Corp., 360 N.E.2d 1168, 1171 (Ill. App. 1977) (person alleging a breach of implied warranty of merchantability is not required to prove specific defects by the presentation of expert testimony); *Indiana*: A.A.A. Exteriors, Inc. v. Don Mahurin Chevrolet, 429 N.E.2d 975, 977 (Ind. App. 1981) (in an action alleging breach of implied warranty of merchantability, (1) "it is not necessary to prove the specific defect in the product", (2) such a "breach...may be established by circumstantial evidence", and (3) "a malfunction itself, in the absence of abnormal use and reasonable secondary causes, may be sufficient evidence of a defect to make the existence of a defect a question for the jury", "[r]epeated malfunctions particularly hav[ing] been held sufficient to establish a breach"); *Iowa*: Van Wyk v. Norden Labs., Inc., 345 N.W.2d 81, 87 (Iowa 1984) ("While the defendant correctly points out that there was no direct evidence of a defect in the vaccine, there was considerable circumstantial evidence to support such a finding, as well as the testimony of four veterinarians who implicated the vaccine." Thus, the issue of whether there was a breach of the implied warranty of merchantability should have been submitted to the jury); *Kansas*: Black v. Don Schmid Motor, Inc., 657 P.2d 517, 525 (Kan. 1983) ("[a] claim for breach of implied warranty may be proved by circumstantial evidence"); *Massachusetts*: Hunt v. Perkins Machinery Co., 226 N.E.2d 228, 232 (Mass. 1967) ("jury could reasonably conclude that the continued smoking of the engine was caused by a condition which constituted a breach...of the warranty of merchantability", because "[a] smoking marine engine can hardly be regarded as of merchantable quality when sold by a distributor of such engines who is unable to cure the defect after persistent efforts"); *Michigan*: Fargo Machine Tool Co. v. Kearny & Trecker Corp., 428 F. Supp. 364, 373-374 (E.D. Mich. 1977) (The burden of "showing...the precise technical explanation behind the malfunctions...is not cast on the buyer of defective goods....It is sufficient for him to show that the goods simply do not conform to the warranty."); Ugarski v. Little Giant Crane & Shovel, Inc., 192 N.W.2d 580, 586 (Mich. App. 1971) ("[t]he difficulties that plaintiff experienced in using the crane and the many breakdowns...occasioned during the time that the crane was in use constituted sufficient evidence it was not fit for the purposes for which it

was used"); *Minnesota*: Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171, 175-176 (Minn. 1978) (the jury could infer that the paint was unmerchantable notwithstanding the absence of direct proof of a specific defect); Industrial Graphics, Inc. v. Asahi Corp., 485 F. Supp. 793, 800 (D. Minn. 1980) ("[t]he failure of the...[CB radios] to withstand normal levels of shock and vibration rendered the units unmerchantable"); Nelson v. Wilkins Dodge, Inc., 256 N.W.2d 472, 476 (Minn. 1977) ("Although liability for breach of warranty attaches only when a defect existing in the goods caused a breakdown in quality,...generally no specific defect need be alleged, and a defective condition can be proved by circumstantial evidence....No direct evidence was introduced as to the causes of the conditions in question. It is reasonable to suppose, however, that vehicles that are fit for ordinary purposes probably do not display these defects this early even if they are driven a great deal within a short period of time. Thus, causes of the faulty paint, windshield wiper, horn bracket and shift lever were questions that should have been decided by the jury. A fortiori, the cause of the inverted taillight covers was a jury question."); *Mississippi*: Fedders Corp. v. Boatright, 493 So. 2d 301, 306 (Miss. 1986) (Breach of the implied warranty of merchantability was established, though "we will never know from this record what in fact caused the problem." Where the heat pump "would 'freeze up' and quit heating in cold, and especially in below freezing weather", it failed to perform "one of the two quite ordinary purposes for which...[the] unit was purchased"—"to adequately heat the...residence in the winter."); *Missouri*: Worthey v. Specialty Foam Prods., Inc., 591 S.W.2d 145, 149 (Mo. App. 1979) ("The showing of specific defects...is obviously one way in which a buyer can establish that a seller has sold goods that are not merchantable and thus, breached the implied warranty. This, however, is not the only way" to demonstrate such a breach. "Here, defendant introduced evidence that the truck had been properly operated and maintained after it was purchased and that after driving the truck for only a few hundred miles it stopped running and was no longer fit for the purpose for which it was bought. Plaintiffs introduced no testimony that conflicted with the defendant's evidence of proper maintenance and operation of the truck. This circumstantial evidence, even though it relates solely to subsequent transaction events,...constitutes substantial evidence sufficient to support the trial court's judgment that the plaintiffs breached the implied warranty of merchantability."); *Montana*: Waddell v. American Breeders Serv., Inc., 505 P.2d 417, 422 (Mont. 1973) (where there was a decline in calf production "the only logical inference is that something was wrong with the semen"); *Nebraska*: Mennonite Deaconess Home & Hosp., Inc. v. Gates Engineering Co., 363 N.W.2d 155, 163-164 (Neb. 1985) (The defendant "was to provide the hospital with a...roof which would not leak

when installed. That, they did not do. This, then was evidence of a breach of merchantability."); *New York*: Bazzini v. Garrant, 455 N.Y.S.2d 77, 79 (Sup. Ct. Suffolk Co. 1982) ("the inference is permissible that [the b]ird was not of merchantable quality at the time of sale since he ceased to function as a merchantable bird so soon thereafter"); Stream v. Sportscar Salon, Ltd., 397 N.Y.S.2d 677, 680 (Civ. Ct. Queens Co. 1977) ("[e]ven in the absence of expert testimony and even without proof of a specific defect, the testimony presented by other witnesses concerning the breakdowns and the oil leaks, support a finding that the replacement engine was defective"); *North Carolina*: Rose v. Epley Motor Sales, 215 S.E.2d 573, 577-578 (N.C. 1975) ("[f]rom the facts shown by the plaintiff's evidence,...it may reasonably be inferred that the vehicle...was not in condition suitable for ordinary driving at the time of sale", notwithstanding that no testimony, expert or otherwise, was presented to establish the specific defect); *Ohio*: McDonald v. Ford Motor Co., 326 N.E.2d 252, 254 (Ohio 1975) (in implied warranty tort action, plaintiffs' "claim that the mountings used to attach the steering column to the instrument panel failed approximately 50 days after the automobile was purchased from Ford's dealer...is sufficient, if proved, to raise an issue that the mountings were not fit and safe for their ordinary and intended use, and were, therefore, defective"); *Oklahoma*: Collins Radio Co. of Dallas v. Bell, 623 P.2d 1039, 1053 (Okla. App. 1980) (" 'the absence of defect...is irrelevant to the question of liability in an action for breach of warranty' "); Perry v. Lawson Ford Motor Co., 613 P.2d 458, 463 (Okla. 1980) (although "[t]his is not to say there cannot be problems or breakdowns with a merchantable machine", "a breakdown upon almost every occurrence of use is incompatible with conformity to merchantable standards"); *Oregon*: Roe Roofing, Inc. v. Lumber Prods., Inc., 688 P.2d 425, 428 (Ore. App. 1984) (plaintiff was not required to demonstrate "the exact cause...[for] the buckling" of the plywood. Rather, "[i]t was a latent defect", whose "existence could be proved circumstantially by evidence that plaintiff used the product in a normal fashion."); *Pennsylvania*: Agostino v. Rockwell Mfg. Co., 345 A.2d 735, 738-740 (Pa. Super. 1975) ("§402A actions are governed by the evidentiary standards of warranty law", and because in a warranty action proof of the specific defect is not required, neither would it be necessary in a strict tort liability action); Knight v. Otis Elevator Co., 596 F.2d 84, 89 (3d Cir. 1979) ("we restate our disagreement with any suggestion in the trial judge's ruling that proof of a specific defect is required" in an action for breach of implied warranty); Greco v. Bucciconi Engineering Co., 283 F. Supp. 978, 982-984 (W.D. Pa. 1967) (Although "plaintiffs in action for breach of warranty have regularly sought to establish the cause of the malfunction..., nothing in the opinions indicates that such evidence was the sine qua non for a verdict by plaintiffs."

Plaintiffs produced sufficient evidence for the jury to find that the product was defective, notwithstanding defendant's argument that no evidence was presented as to the existence of a defect.); MacDougall v. Ford Motor Co., 257 A.2d 676, 678 (Pa. 1969) (under the evidentiary standards of warranty law "the occurrence of a mechanical malfunction evidences a 'defective condition' without proof of the specific defect in design or assembly causing the malfunction"); *South Carolina*: Cohen v. Allendale Coca-Cola Bottling Co., 351 S.E.2d 897, 899 (S.C. App. 1986) ("[i]n an action for...breach of warranty, the plaintiff may prove his case by circumstantial evidence"); *South Dakota*: Drier v. Perfection, Inc., 259 N.W.2d 496, 504 (S.D. 1977) ("The burden of proof is on the plaintiff to show that there was a defect in the product at a time when the defendant had possession, control or responsibility for the condition of the product. A product is defective when it fails to perform reasonably and safely the function for which it was intended. No specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the problem was caused by a defect."); *Tennessee*: Motley v. Fluid Power of Memphis, Inc., 640 S.W.2d 222, 226 (Tenn. App. 1982) (" 'Proof of the specific defect in construction or design causing a mechanical malfunction is not an essential element in establishing breach of warranty.' When machinery 'malfunctions', it obviously lacks fitness regardless of the cause of the malfunction. Under the theory of warranty, the 'sin' is the lack of fitness as evidenced by the malfunction itself rather than some specific dereliction by the manufacturer in constructing or designing the machinery' "); *Texas*: Ford Motor Co. v. Tidwell, 563 S.W.2d 831, 835 (Tex. App. 1978) (in action for breach of implied warranty of merchantability, plaintiff need not "produce direct or opinion evidence of" a defect, "but could rely on circumstantial evidence"); Walter Baxter Seed Co. v. Rivera, 677 S.W.2d 241, 245 (Tex. App. 1984) (Argument "that the trial court erred in submitting special issues regarding the non-merchantability of the seed...because the issues did not inquire regarding the defectiveness of the seed" was rejected. "The charge defined merchantable as 'goods which are fit for the ordinary purpose for which such goods are used' ", a "definition [that] meets the requirements set forth" in the Texas UCC §2-314); *Utah*: Utah Co-op. Ass'n v. Egbert-Haderlie Hog Farms, Inc., 550 P.2d 196, 198 (Utah 1976) ("It is not necessary that the defendant show absolute certainty that the source of infection among the hogs arose from the ingredients supplied by the plaintiff, but it is sufficient if there is substantial evidence to support the likelihood that the infection came from that source....[T]here were circumstances shown in the evidence from which a jury could reasonably find that the contamination contained in the feed came from the components furnished by the plaintiff or that the contamination was a result of plaintiff's preparation of the feed and that contamination resulted

consumption/engine damage—not "defectively designed" valve stem seals—that rendered these Rabbits unfit for their ordinary purposes. (*See* 6a, 22a-23a.)

At the last pretrial conference held on May 26, 1987, various suggested special jury interrogatories were *tentatively* discussed, including a set submitted by plaintiffs that did include, as the Court of Appeals noted (9a-10a), an initial question calling for the jury to find whether the polyacrylate valve stem seals were "defective". As discussed below, the subsequent history of this litigation pertinent here, starting with the trial that commenced on June 1, 1987, consisted of plaintiffs' unsuccessful attempt to correct the error in their earlier suggested "Jury Issues" by substituting a new set that did not condition a jury finding of unfitness on an initial jury finding that

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from the processing."); *Vermont*: Vermont Food Indus., Inc. v. Ralston Purina Co., 514 F.2d 456, 462 (2d Cir. 1975) ("[t]he applicable Vermont case law is that direct proof is not necessary to establish a breach of implied warranty of merchantability"); *Wyoming*: Valentine v. Ormsbee Exploration Corp., 665 P.2d 452, 462 (Wyo. 1983) ("It may be conceded that proof of the failure of the article or its malfunction standing alone would not be sufficient to prove or to allow any inference that the tool was defective. It is, however, a strong circumstance to be considered along with the remaining facts and it has been held not to be necessary to prove a specific defect....[W]e believe...the proper rule" to be that " '[a] prima facie case that a product was defective and that the defect existed when it left the manufacturer's control is made by proof that in the absence of abnormal use or reasonable secondary causes the product failed to perform in the manner reasonably to be expected in light of [its] nature and intended function.' ").

the valve stem seals were "defectively designed". These repeated efforts failed, and the trial ended on June 19 when the jury returned a "No" answer to the first special interrogatory, which asked whether the seals were "defectively designed".

2. *Trial in the District Court*

On the first day of trial it was again made clear that the May 26 "Jury Issues" submitted by plaintiffs were tentative and in no sense binding as their final version.[2]

> MR. HUNTER [VW Counsel]: Your Honor, there is one inquiry. We were supposed to get some proposed Jury instructions from them....They were supposed to be in, we haven't gotten them yet from the plaintiffs' attorneys....
>
> MR. WITNESS [MR. MOORE (plaintiffs' counsel)]: Your Honor, our instructions are more or less scattered throughout various briefs....
>
> THE COURT: I'm not requiring you have proposed Jury instructions in hand by tomorrow, but I just want to know when it can conveniently be done?
>
> MR. MOORE: By the end of the week, surely, but Your Honor had indicated that we didn't need to do that until we had put on some of the evidence, because that will determine what the instructions are going to consist of. We will have them by the end of the week for sure....

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[2] At the May 26 pretrial conference, the District Judge emphasized the tentative nature of the "Jury Issues":

> I'm not fixing the issues and saying this morning we are going to frame the issue[s] that are going to the jury. I'm saying as of now how they look to me and what I will do subject to further learning. . . .Okay. I'm going to mark these as *tentative* issues. I'll get out a copy of it to counsel. They are, as the rules say, *tentative not final*. Nobody needs to get broke up about the fact that's what it looks like in Court today. I'm assuming that there will be some evidence to support the various issues, but not decide them. If the evidence doesn't support any issue, it won't be submitted [emphasis added].

THE COURT: Have you filed anything labeled requested instructions to the Jury...that this Court could read with some confidence on your part it was accurate as a matter of law with respect to the facts you intend to prove?

MR. MOORE: Not in one single document....

THE COURT: Because I think the instructions are simple. I would like to know ahead of time, well ahead of time, what is going to be presented in Court.

MR. MOORE: By the end of the week, Your Honor, we will have it all in one document for you, if that is okay.

THE COURT: I'm afraid that will be soon enough.

And on Thursday, June 4, 1987 the tentative and nonbinding nature of the previously discussed "issues" was once again reiterated by the Court:

THE COURT: ...The court had referenced those several times this morning. *We had understood they were given out as tentative issues, not as a matter for objection or not objection*, but —

MS. EAGLES [VW Counsel]: Your Honor, we do object to the tentative issues, primarily....

THE COURT: They have been submitted to counsel for three days. *I assume there will be some comments.* Nobody has proposed any different ones except the original ones that we discussed.

MS. EAGLES: We just didn't want there to be any misunderstanding that we had approved or conceded...these issues were appropriate [emphasis added].

The First Colloquy. Then, on the very next day, Friday, June 5, 1987, as they had promised on Monday, June 1, 1987, and as the Court had then permitted, plaintiffs submitted their formal and final jury instructions which incorporated their substantially *revised* "jury issues".

MR. SMITH [Plaintiffs Counsel]: One final thing, Your Honor. We have handed in our instructions, *they involve a rather substantial revision of the proposed issues*, but I think you will like those instructions, they make a lot of sense to

me. Beverly [Moore] wrote them,... and I would like Your Honor to look at it....

THE COURT: I will hear you on that when you propose a new set of issues.

MR. SMITH: Your Honor, *the issues have changed*—

THE COURT: I think you are barred by Laches from making any recommendations about issues, because the ones I wrote have been before you for four days.

MR. SMITH: Your Honor, we have been working on this night and day until now, and I really think some of those issues won't quite work. *Why don't you pass judgment on it after you have read this and see what you think about it. It does change the issues somewhat....*

THE COURT: Well, it is my observation if you can frame a rational set of issues, a Jury will give rational answers to them. As proposed Tuesday morning to all of you in writing, those issues are consistent, I don't think you can get an inconsistent verdict if all those issues are answered.

MR. SMITH: *Just reserve judgment until you have read these*, Your Honor. It makes imminent sense.

THE COURT: How many issues did you end with, fewer, or more?

MR. MOORE [plaintiffs' counsel]: Fewer....There are now five groups of issues, some of them have subparts.

THE COURT: There is no reason for you to get excited about it, you have one good set of issues in your possession already. I will look at them when I see them. That's a copy of what?

MR. MOORE: ...[O]ur proposed instructions. They have been filed in the clerk's office. I wondered if you wanted a copy [emphasis added].

These new jury instructions and reformulated jury issues clearly constituted an objection by plaintiffs to the previous May 26 "issues" for which plaintiffs now proposed that these new ones be substituted. Of critical importance, plaintiffs' revised jury issues were not tied to the initial question, ultimately submitted by the District Court, as to whether the polyacrylate valve stem seals were "defectively

designed". Instead, the first determinative question plaintiffs would have asked the jury was: "Were those Rabbits that suffered excessive oil consumption and related engine damage between 10,000 and 80,000 miles unfit for their ordinary purposes?" The written jury instructions accompanying this proposed jury question, which plaintiffs' counsel (Mr. Smith) repeatedly asked the District Judge to read before rejecting, explained:

> [I]f you find...that these Rabbits were substantially and significantly inferior to other similar cars with respect to the plaintiffs' claims as to excessive oil consumption and related engine failure or diminished resale value, you can find that their Rabbits were unmerchantable with respect to that or those claims.[6] It is essentially a judgment question for you, based upon the evidence, as to *whether these Rabbits experienced these problems at a rate so much higher or so much more seriously than did comparable cars as to make these Rabbits unfit for their ordinary purposes.*[7]
>
> In making these determinations, you cannot simply base your decisions on the damages or losses that the plaintiffs and class members may have suffered. You must determine that the cause of these losses were the direct and proximate result of VW's breach of the implied warranty of merchantability. *You have heard much evidence from both sides concerning the polyacrylate valve stem seals, and you may consider that evidence in connections with the issue of proximate causation.* You may also consider evidence as to other aspects of the Rabbit oil system as a whole, including the engine heat temperature, the oil warning light, the size and design of the oil pan, and the oil dipstick design as those aspects may bear upon the adequacy of the polyacrylate seals. *But you need not find any specific defect as the particular cause of the excessive oil consumption and related engine damage. You need only find that these Rabbits were unfit for their ordinary purposes*[8] and that such unfitness was proximately caused by defendant's breach of the implied warranty of merchantability [emphasis added; footnotes omitted].

Accompanying these 17 pages of revised jury instructions and jury issues were 23 more pages of largely single-spaced footnote material setting forth the detailed legal authority for each point. For example, footnote 8 called out in the passage quoted above was essentially the same as footnote 1 in this Petition for Certiorari, and the cases cited therein demonstrated why requiring the jury to find that the valve stem seals were "defectively designed" would be clear error as a matter of law. Nor was legal material of this nature new to the District Judge; the same cases had been cited to him earlier in connection with class certification. Nonetheless, having commented that "I will look at them", the District Judge never seriously considered these proposed instructions and revised jury issues. Plaintiffs correctly interpreted this silence as a rejection of their proposals by the District Court. Having proposed these as a substitute for their pretrial "Jury Issues", plaintiffs had made their objection known and were under no duty to keep repeating it.

The Second Colloquy. Clearly, (1) plaintiffs' June 5 submission of their revised jury issues/instructions, (2) the colloquy noting that the new set contained "rather substantial revision", and (3) the extensive written materials specifically explaining why the "defective seal" issue should not be submitted, were together more than

sufficient notice for the district court to make the necessary corrections. But plaintiffs did not let the issue rest there. At the close of trial on June 16, 1987, the District Court stated:

> THE COURT: I have, of course, studied all of the proposed instructions that may be in the file. I have mastered all the intricacies of all of them. I would appreciate it if you check before you leave and make sure I haven't lost them somewhere in the courtroom. I would like to take them home.

Referring specifically to plaintiffs' June 5 substitute proposals, their counsel responded:

> MR. SMITH: [I]f we don't know what you had, how will we know if you haven't got what we need you to have? *The only things we care about you having is the set Beverly Moore turned in last Thursday, week ago* [emphasis added].
>
> THE COURT: I have not yet gotten any help from lawyers on the requests for instructions. Does anybody from either side think about proposing some instructions in about five pages to embrace all the law.
>
> MR. SMITH: This is a pretty distinct batch. It is only 19 pages, if you want me to give you another set to be sure.... This is the right one.

At that point there could hardly have remained any doubt that plaintiffs had brought their substitute jury issues/instructions and the specific basis therefor to the district judge's attention. Not only had he "studied all of the proposed instructions" and had "mastered all of the intricacies of all of them", he was going "to take them home", presumably for a final review. In that context plaintiffs should have been permitted to assume, without being explicitly told, that their objections would be automatically preserved if the district judge did

not submit their revised jury issues as proposed. *See, e.g., Solis v. Rio Grande City Independent School*, 734 F.2d 243, 248n.4 (5th Cir. 1984); *Sherrod v. Berry*, 827 F.2d 195, 200 (7th Cir. 1987).

The Third Colloquy. Having twice orally called the district court's attention generally to their proposed substitute jury issues, which in writing identified the particular objection to the "defective seal" issue and the detailed legal grounds therefor, plaintiffs reiterated that specific objection orally at the June 18, 1987 charge conference. Referring directly to the lengthy case citation footnotes to the discussion of the excessive oil consumption/fitness Jury Issue No. 1(b) in plaintiffs' June 5 substitute, plaintiffs' counsel reiterated that "in every state under a breach of implied warranty, you don't have to show what the defect is. All you have to do is show the product did not perform as implied[ly]...warranted."

Thus, by that time plaintiffs had complied with not one but *both* "methods of preserving a claim of error concerning the submissions of a special interrogatory to the jury: a party may either propose and be denied a special interrogatory or may object to a proposed special interrogatory before the jury retires." *Stewart & Stevenson Services, Inc. v. Pickard*, 749 F.2d 635, 641-643 (11th Cir. 1984). Yet fully cognizant of plaintiffs' position, the district judge instead submitted

the "defective seal" issue that was diametrically opposed to what plaintiffs had requested. Such objections must be deemed preserved. *See, e.g., Bowley v. Stotler & Co.*, 751 F.2d 641, 646-648 (3d Cir. 1985).

3. *Opinion of the Court of Appeals*

On appeal the Fourth Circuit's decision was correct in only one respect. It accurately summarized plaintiffs' contention of error: In this implied warranty of merchantability case it was not necessary to prove a "specific defect"—i.e., that the polyacrylate valve stem seals were "defectively designed" (Jury Issue No. 1 answered "No" (16a)), or even that it was those defective seals, and not some other defect, that rendered these VW Rabbits "unfit for their ordinary purposes" (Jury Issue No. 2 not reached (16a)). Rather, it would have been sufficient to prove only that these Rabbits were unfit for the ordinary purposes of transportation by virtue of their excessively high rate of excessive oil consumption and consequent engine seizures. (7a.)

Statistics alone could prove classwide causation due to *some* VW defect, because otherwise other manufacturers' cars would also have suffered the same high rates of excessive oil consumption, but the evidence showed that they did not. If plaintiffs were correct, as the

cases cited in note 1 *supra* show they doubtless were, the District Court's Jury Issue No. 1 impermissibly imposed upon them "an element of proof not otherwise required by law" (7a)—that they affirmatively *prove* that the polyacrylate seals were "defectively designed", as distinguished from the mere presentation of mechanical causation *evidence* that cracked and deteriorated seals may have played a major role in the excessive oil consumption/engine seizure unfitness.

Instead of reaching this issue on the merits, the Panel held that "[i]f plaintiffs' 'Proposed Jury Instructions' were intended as a formal objection to the district court's then tentative adoption of plaintiffs' 'Proposed Jury Issues,' that intention was not made clear to the judge as required by Rule 51...." (10a.) In reaching that conclusion, the Fourth Circuit wholly ignored the record facts and, indeed, in one significant respect altered those facts to support its conclusion. In particular, the Court of Appeals failed even to mention the second and third colloquys with the District Judge discussed above, even though those colloquys were highlighted in plaintiffs' appellate briefs and again in their petition for rehearing.

What the Court of Appeals instead focused upon was the initial June 5 colloquy in which counsel advised the District Court, in

tendering plaintiffs' new jury instructions and issues, that "they involve a rather substantial revision of the proposed issues." The Court of Appeals dismissed this discussion on the ground that "[p]laintiffs' counsel did not...*voice* a single *specific* objection during the *colloquy regarding the 'Proposed Jury Instructions.'* " (10a (emphasis added).)

It was more than sufficient, however, that the "specific objection" to the defective seal issue was set forth in detail in the 40 pages of revised jury instructions and issues that were the very subject matter of that oral colloquy—especially where the District Judge was repeatedly urged in the colloquy to read these written materials and stated that he would, and where the District Judge should have already been well conversant with the legal concepts involved from prior class certification briefs.

A similar situation was presented in *Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 692-693 (D.C. Cir. 1987), where the defendant argued that plaintiff's objection to jury instructions at trial "failed to state distinctly the reason for his objection." But "[a] full discussion" of the relevant case law "as well as a specific request for" the instruction mandated by that case law "was included in plaintiff's trial brief." Likewise, in *Pierce v.*

Ramsey Winch Co., 753 F.2d 416, 424-425 (5th Cir. 1985), a plaintiff argued that a defendant's "simply submitting instructions to the court and objecting, without explanation, to the court's failure to give those instructions will not preserve error." The Fifth Circuit generally agreed that such a procedure, without more, "is unlikely to draw the court's attention to any errors in the charge that might be corrected before deliberations begin." The objections were nonetheless preserved because, as here, that defendant had submitted, in addition to the requested instructions, a memorandum that explained the basis for the instructions.

Although ignoring the second and third oral colloquys with the District Judge and the extensive written explanatory materials filed in connection with the first colloquy, the Court of Appeals cited two further occasions—at the final charging conference and after the jury had been instructed—where "[p]laintiffs did not avail themselves of this opportunity to object to the interrogatories." (10a-11a.) Such silence might have been fatal had plaintiffs not *already* made their position clear *three times*. On that record it was obvious that the "defective seal" issue had been resolved adversely to plaintiffs and that further objections would have been pointless and legally unnecessary. *Brown v. Avemco Investment Corp.*, 603 F.2d 1367,

1373 (9th Cir. 1979); *Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 693 (D.C. Cir. 1987).[3]

> Finally, the Court of Appeals "note[d] as significant" the fact that the third interrogatory contained in plaintiffs' [revised] "Proposed Jury Instructions," required the jury to determine whether the valve stem seals were defective. Thus, even if the court had adopted plaintiffs' second set of proposed jury issues rather than their first set, plaintiffs would still have been required to prove that the valve stem seals were defective in order to recover on their claim for breach of implied warranty.

(10a at n.1) This "fact" would indeed have been "significant", had it been a "fact". If true, the District Court's error would have been harmless as to the merchantability claims. Plaintiffs' proposed substitute issues would have amounted to only a minor restructuring and rephrasing—or merely a rearrangement of essentially the same jury issues that the District Court submitted.

The problem is that this "fact" was not a fact. Under plaintiffs' substitute jury issues, only *after* and not before answering the basic

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[3]Even if plaintiffs' counsel were technically guilty of failing to preserve their Rule 51 objection, this is the exceptional case involving an error so plain and fundamental that the Court of Appeals should have reached the merits . *See* Spell v. McDaniel, 824 F.2d 1380, 1398-1399 (4th Cir. 1987); Lummas Indus., Inc. v. D.M. & E Corp., 862 F.2d 267, 270 (Fed. Cir. 1988); Brown v. Avemco Inv. Corp., 603 F.2d 1367, 1374-1375 (9th Cir. 1979). The case law supporting plaintiffs' position that no "specific defect" need be proven in an implied warranty of merchantability case is so overwhelming and uncontradicted (*see* cases cited note 1 *supra*) that the manifest injustice wrought by the District Court's error required appellate correction. The Court of Appeals failed to address this point in denying plaintiffs' petition for rehearing.

merchantability question I(b)—whether the Rabbits that experienced excessive oil consumption were unfit for their ordinary purposes—would the jury have considered any issue relating to "defective valve stem seals". But the jury's finding that the seals were *not* defective would *not* have disturbed its finding that these VW Rabbits were unmerchantable.

The jury would not have reached the defective seals issue until plaintiffs' Issue No. I(c) (the "third interrogatory" that the Court of Appeals mentioned):

> (c) If the answer to (b) is "yes", was that unfitness caused by defectively constructed polyacrylate valve stem seals installed by defendants in these Rabbits, in conjunction with other aspects of the Rabbit oil system such as the engine heat conditions, oil pan, warning light, and dipstick?

Whereas *all* of the District Court's *other* jury issues, including merchantability (No. 4), were dependent on an affirmative answer to its No. 1 (defective seals), *only* plaintiffs' I(d) was dependent on an affirmative answer to their "defective seals" No. I(c):

> (d) If the answers to (b) and (c) are "yes," did one or both defendants know or should they have reasonably known that the excessive oil consumption and related engine damage would not likely be manifested within the 12 months or 20,000 miles limit of Volkswagen of America's limited written warranty?

This linkage of the "defective seals" I(c) *only* with I(d) was deliberate. The jury's answers to these questions were to be *advisory*

only, providing guidance to the District Court for *its* ultimate decision on the *legal* issue of whether VW's attempted limitation of the duration of its implied warranties was reasonable and conscionable under 15 U.S.C. §2308(b). *See Carlson v. General Motors Corp.*, 883 F.2d 287, 292 (4th Cir. 1989). The statistical failure rate evidence, and VW's knowledge of it, would likely have required a finding of unconscionability even if the seals were not themselves "defective".

The bottom line is that none of that had any determinative bearing on the jury's ability to find for the plaintiff class on the breach of implied warranty issue under plaintiffs' carefully structured jury questions. Having already found unmerchantability under plaintiffs' "fitness" No. I(b), even if the jury had answered plaintiffs' "defective seals" No. I(c) "no", and therefore would not have reached plaintiffs' I(d), the I(b) finding that these Rabbits were unmerchantable would still stand (and the jury would have then proceeded to plaintiffs' other interrogatories regarding diminished resale value, deceptive trade practices, fraudulent concealment, and punitive damages).

All of this was clearly brought to the attention of the Court of Appeals both before and after the rendering of its opinion. In their petition for rehearing *en banc*, plaintiffs urged that "whatever else the

Court may do, it should delete the Panel's footnote 1 because it misstates the facts." The facts remained misstated in order to support the result that the Fourth Circuit chose to reach.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Ruling that Plaintiffs' Thrice-Made Objections to a Fundamentally Improper Special Jury Interrogatory, Supported by Detailed Written Explanation, Were Not Sufficiently "Clear", Converts Rule 51 into a Requirement of Needless Repetition of Objections Already Repeatedly Made, Contrary to the Teachings of Rule 46 and the Decisions of All Other Circuits that Have Considered This or Similar Issues.

The Fourth Circuit's decision suggests that three oral colloquys accompanied by extensive written materials proposing a fundamentally different special jury interrogatory nonetheless did not amount to a sufficiently "clear" objection under Rule 51. This holding conflicts with the decisions of every other Circuit addressing similar issues, none of which the Fourth Circuit bothered to cite or discuss.[4] That alone is sufficient warrant for this Court to review the

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[4] *See, e.g.*, Bowley v. Stotler & Co., 751 F.2d 641, 646-647 (3d Cir. 1985); Solis v. Rio Grande City Independent School, 734 F.2d 243, 248n.4 (5th Cir. 1984); Stewart & Stevenson Services, Inc. v. Prichard, 749 F.2d 635, 641-643 (11th Cir. 1984); Stewart v. Ford Motor Co., 553 F.2d 130, 139-141 (D.C. Cir. 1977); Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686, 689-890 (D.C. Cir. 1987); Pierce v. Ramsey Winch Co., 753 F.2d 416, 423-424 (5th Cir. 1985); Brown v. Avemco Inv. Corp., 603 F.2d 1367, 1370-1375 (9th Cir. 1979); Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Md., 202 F.2d 794, 800-801 (7th Cir. 1953).

Fourth Circuit's decision. But more importantly, in practical terms this ruling has substantial potential for cluttering trial practice with unnecessarily repetitive formal objections of precisely the sort that Rule 46 was intended to avoid *and* for affording federal appeals courts with yet another device to avoid reviewing the merits of clearly erroneous trial court rulings.

The Fourth Circuit's decision, if allowed to stand, will inevitably complicate the process of resolving jury instruction/special jury interrogatory issues. Out of an abundance of caution, counsel can no longer be content with the "mere" submission of written alternative jury proposals, no matter how lengthy and detailed. The substance of the written materials must be orally communicated to the trial judge with "adequate" specificity, whatever that means.

And no matter how many times this has been done without success, missing any further opportunity afforded by the trial judge to repeat the objection can be fatal. At least the side for whom the jury ultimately rules will so argue on appeal. The scarce resources of the federal courts of appeals will, as in death penalty *habeas corpus* cases and so many other areas, be deflected from defining the merits of

what a jury should properly decide to nitpicking analysis of whether an "objection" was "sufficiently" or "adequately" clear. Rule 46 was designed to avoid such unnecessary and repetitious procedures and judicial focus on them.

B. The Court of Appeals Should Not Be Permitted to Deny a New Trial to Hundreds of Thousands of Potential Claimants by Deliberately Altering the Record Facts to Support Its Improper Legal Conclusion.

An outside observer, knowing nothing of the true facts, could read the Fourth Circuit's decision as holding only that an objecting party must do more than suggest an alternative set of jury instructions that merely restructure and rephrase the issues without changing their substance. That the Fourth Circuit deliberately changed the facts to support its conclusion is an even more important reason for granting the writ. The integrity of our legal system simply cannot tolerate such factual manipulations by courts of appeal, which unfortunately occur all too frequently.

This Court has not hesitated in the past to correct the Fourth Circuit for playing fast and loose with the facts. *Bazemore v. Friday*, 478 U.S. 385, 405n.17 (1985)(reinstating class certification where "[t]he findings of the District Court flatly contradict the Court of Appeals' conclusion that salaries are reached in any "autonomous'

fashion or are arrived at by the counties"). Unless this Court grants review, many of these 300,000 class members, whose VW Rabbit automobiles indisputably suffered excessive oil consumption and related engine seizures, may be bound by a judgment that their cars nonetheless were "fit for their ordinary purposes"—a judgment improperly based upon an instruction requiring a finding that the valve stem seals were "defectively designed" to which their counsel objected three times orally with extensive written explanation. Because the Fourth Circuit changed or ignored the facts regarding these objections, these litigants, now after a decade after the initial retail sales of these cars, have yet to have their day in court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Beverly C. Moore, Jr.
(*Counsel of Record*)
Moore & Brown
4900 Massachusetts Ave., N.W.
Suite 205
Washington, D.C. 20016
(202) 364-1032
Attorney for Petitioners
(Additional counsel listed on cover)

December 27, 1989

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-2688

FILED
SEP 28 1989
U.S. Court of Appeals
Fourth Circuit

HUGH DEADWYLER, et al.
Plaintiff - Appellant

v.

VOLKSWAGEN OF AMERICA, INCORPORATED;
VOLKSWAGEN AG
Defendants - Appellees

No. 88-2502

HUGH DEADWYLER, et al.
Plaintiff-Appellee

v.

VOLKSWAGEN OF AMERICA, INCORPORATED;
VOLKSWAGEN AG
Defendants - Appellants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the peition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

IT IS FURTHER ORDERED that the opinion is modified in the following respects:

1) On page 4, line 18, "1988" should be "1987".

2) On the same page, line 20, "8" should be changed to "9".

3) On page 14, issue 8 should be followed by issue 9, reading as follows:

> 9. If issues one and two are answered "Yes," did defendants act in reckless disregard of the rights of plaintiffs and their class?
>
> Answer: _____

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Russell and Judge Haynsworth.

For the Court,

/s/ John M. Greacen
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2688

Hugh Deadwyler, et al.,

Plaintiffs-Appellants,

versus

Volkswagen of America, Incorporated;
Volkswagen AG,

Defendants-Appellees.

No. 88-2502

Hugh Deadwyler, et al.,

Plaintiffs-Appellees,

versus

Volkswagen of America, Incorporated;
Volkswagen AG,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. James B. McMillan, District Judge. (CA-85-38)

Argued: December 7, 1988 Decided: September 5, 1989

Before ERVIN, Chief Judge, RUSSELL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

Beverly Cooper Moore, Jr. (Sandra D. Benson, Stuart J. Logan, B. Ervin Brown, II, MOORE & BROWN; Charles R. Watkins, Jack L. Block, SACHNOFF, WEAVER & RUBENSTEIN, on brief) for Appellants/Cross-Appellees. Daniel Vladimir Gsovski (HERZFELD & RUBIN, P.C.; Bynum M. Hunter, Catherine C. Eagles, SMITH, HELMS, MULLISS & MOORE; William F. Womble, Jr., Robert C. Dortch, WOMBLE, CARLYLE, SANDRIDGE & RICE, on brief) for Appellees/Cross-Appellants.

ERVIN, Chief Judge:

Plaintiffs brought this breach of implied warranty action against Volkswagen of America, Inc., and Volkswagenwerk, AG (collectively "Volkswagen"). Having failed to convince the jury of their claim that certain engine components installed in their Volkswagen Rabbits were defective, plaintiffs now appeal from the district court's refusal to grant them a new trial. Volkswagen cross appeals from the district court's summary refusal to consider an award of attorney's fees for Volkswagen. For the reasons stated below, we are not persuaded by plaintiffs' assertions of error and accordingly affirm the judgment for Volkswagen. We remand, however, with instructions to the

district court to hear Volkswagen's requests for attorneys' fees or sanctions.

I.

Plaintiffs brought this nationwide class action under the Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §§2301-2312, alleging breach of the implied warranty of merchantability defined by UCC §2-314(2)(c). Plaintiffs claim that Volkswagen installed defective valve stem seals in the engines of gasoline powered Volkswagen Rabbits for model years 1976 to 1979. These valve stem seals, made of polyacrylic rubber, are supposed to prevent oil from leaking into the engine's combustion chamber. Plaintiff's amended complaint specifically alleged that "due to the interaction of their inferior polyacrylic elastomer material with the relatively high heat conditions uniformly generated by the Rabbit engines, the seals tended to gradually and prematurely harden, crack, and deteriorate, typically at mileages of 20,000 to 40,000." Plaintiffs sought to recover monetary losses due to excessive oil consumption, engine "seizures" and the diminished resale value of their Rabbits. Plaintiffs also sought recovery under various pendent state law unfair trade practice claims on the grounds that Volkswagen knew the valve stem seals were defective but concealed this

knowledge from purchasers.

In February of 1987, the district court issued a Revised Class Action Order certifying, with exceptions not relevant here, three classes of plaintiffs: (1) 1976 to 1979 model Rabbit owners who incurred unreimbursed expenses for excessive oil consumption or engine failure between 10,000 and 80,000 miles; (2) persons who purchasesd 1976 to 1979 model Rabbits new or second hand prior to October 1979 and who sold their vehicles within six years of the vehicle's original retail purchase; and (3) Rabbit owners with pendent state law deceptive or unfair trade practice claims. After more than two years of discovery and motions practice, the case went to trial on June 1, 1988 [*sic*—1987].

On June 18, the jury retired to consider the evidence and to make findings on the nine issues submitted by way of special verdict interrogatories. (The text of those interrogatories is attached as Appendix A.) The first interrogatory ("Issue #1") asked, "Were the polyacrylate valve stem seals installed by defendants in the 1976-1979 gasoline Rabbit automobiles defectively designed?" The other interrogatories were phrased such that if this first question was answered negatively the jury was not to consider the remaining issues. On June 19, the jury returned the special verdict having answered the first question

negatively and judgment was subsequently entered for Volkswagen.

II.

A.

Plaintiffs vigorously challenge the form and content of the special verdict interrogatories submitted to the jury. The special verdict required the jury to find that the polyacrylic seals were defectively designed before the jurors could proceed to consider other issues. Thus, as plaintiffs recognize, an affirmative finding on Issue 1 was a necessary condition precedent to an affirmative finding on any of the remaining issues. Plaintiffs assert that this requirement was erroneous because it effectively required them to prove a specific design defect as an element of their claim that the Rabbit's excessive oil consumption amounted to a breach of the UCC's implied warranty of merchantability. Plaintiffs argue that a successful claimant under UCC §2-314(2)(c) and its various and sundry state law enactments need not allege or ultimately prove a specific design defect but need only prove that the goods sold were not fit for their ordinary purpose. Plaintiffs conclude that they are entitled to a new trial because the special verdict impermissibly imposed upon their claim an element not imposed by the UCC.

Plaintiffs also argue that the special verdict similarly misapplied the legal requirements governing their pendent state law claims. These various "Little FTC Act" unfair trade practice claims were premised on the allegation that Volkswagen knew that the valve stem seals were defective, or likely to be defective, and that Volkswagen concealed this knowledge from purchasers. Plaintiffs contend that applicable state law does not require claimants to show a specific defect in order to prove that Volkswagen engaged in unfair or deceptive trade practices. Thus, plaintiffs conclude that the special verdict erroneously tied success on their unfair trade practice claims to a finding that the valve stem seals were defective.

Special verdicts are authorized by Rule 49 of the Federal Rules of Civil Procedure. As this court has previously noted, both the initial decision to use a special verdict and the formulation of issues submitted are matters "resting in the sound discretion of the trial judge." *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir. 1976), *cert. denied*, 429 U.S. 980 (1976). "It follows then, that our review of the form of the trial court's special interrogatories is confined to whether their use in that form was an abuse of discretion." *Id.* A district court abuses its discretion by, among other things, "misappre-

hending the law with respect to underlying issues in litigation." *Quince Orchard Valley Citizens Associates, Inc. v. Hodel*, 872 F.2d 75, 78 (4th Cir. 1989), *quoting Goldie's Bookstore v. Super. Ct. of State of California*, 739 F.2d 466, 470 (9th Cir. 1984). It follows that the trial court abused its discretion if the special verdict interrogatories did indeed impose upon plaintiffs' claims an element of proof not otherwise required by law.

We find it unnecessary, however, to reach the question of whether or not plaintiffs in a breach of implied warranty class action need prove the existence of a specific defect common to all members of the class. We also find it unnecessary to determine whether the special verdict impermissibly tied plaintiffs' unfair trade practice claims to the design defect issue in their breach of warranty claims. Instead, we find that plaintiffs failed to adequately object to the submission of Issue 1, the interrogatory in dispute here. "[A] party who fails to object to the form of special interrogatories cannot complain for the first time on appeal." *J.C. Motor Lines, Inc. v. Trailways Bus System*, 689 F.2d 599, 603 (5th Cir. 1982). *See also Martin v. United Frui: Company*, 272 F.2d 347 (2d Cir. 1959).

Issue 1 was tentatively adopted, with only minor revisions, from the "Proposed Jury Issues" submitted by plaintiffs at the

pre-trial conference. Indeed, the district court eventually adopted the substance and structure of all the plaintiffs' proposals except those relating to punitive damages. Plaintiffs nevertheless claim to have later objected to their own proposal when, five days into the trial and long after the court's initial deadline, they submitted a paper entitled "Proposed Jury Instructions." These proposed instructions did restructure and rephrase several of plaintiffs' previously proposed jury issues.[1] Plaintiffs counsel did not however, voice a single specific objection during the colloquy regarding the "Proposed Jury Instructions." If plaintiffs' ["]Proposed Jury Instructions" were intended as a formal objection to the district court's then tentative adoption of plaintiffs' "Proposed Jury Issues," that intention was not made clear to the judge as required by Rule 51 of the Federal Rules of Civil Procedure.

Plaintiffs' failure to make a clear objection to Issue 1 is further confirmed by their silence at the charging conference. After discussing several objections raised by Volkswagen, the

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[1]We note as significant the fact that the third interrogatory contained in plaintiffs' "Proposed Jury Instructions," required the jury to determine whether the valve stem seals were defective. Thus, even if the court had adopted plaintiffs' second set of proposed jury issues rather than their first set, plaintiffs would still have been required to prove that the valve stem seals were defective in order to recover on their claim for breach of implied warranty.

court stated, "Gentlemen, I have rewritten these [interrogatories] several times and given you all copies of them. If anybody else has any comment about them, I want them in the next 20 minutes so I can run a final print." Plaintiffs did not avail themselves of this opportunity to object to the interrogatories. Nor did they voice an objection to Issue 1 when, after instructing the jury, the court asked, "Are there any errors or omissions that the plaintiffs wish to call to the attention of the court?" On this record, we are compelled to conclude that plaintiffs did not adequately object at trial to the special verdict interrogatory challenged here and we therefore decline to review the merits of that challenge.

B.

Plaintiffs did, however, clearly object to the judge's supplemental jury instructions regarding the definition of a design defect. During the first day of their deliberation, the jury returned to open court and asked for a "little clearer definition of design in issue number one." One juror stated, "I think what we are needing clarification on is whether it is the design or the application." Plaintiffs contend that the trial court's response to this question only confused the jury because the judge explained the notion of a design defect in the abstract rather than in the

context of the Rabbit engine.

Even if it would have been error for the trial court to discuss the issue of design defect in abstract terms, we must reject plaintiffs' argument. There is simply no support for plaintiffs' characterization of the judge's explanation. The judge clearly instructed the jury to consider the question of defective design in the context of the purpose the seals were supposed to serve. He stated at one point "well, it's essentially the design, of course, the design embraces the application. Design for a particular use." With the luxury of time to consider all of the possible explanations which the trial court could have given we might be able to formulate a clearer answer to the jury's query. Given the time constraints within which trial courts must respond to impromptu requests for clarification, the judge's necessarily extemporaneous explanation was sufficiently clear and legally adequate to make plain the jury's task under the special verdict.

C.

The special verdict, as it stands, allows us to quickly resolve plaintiffs' remaining challenge. At trial, plaintiffs sought to introduce statistical evidence regarding the average diminished resale value of 1976-1979 Rabbits. This evidence was of course relevant to the issue of damages under plaintiffs' breach of

warranty claims. The trial court disallowed this proffered testimony because it believed that significant regional variations in resale market prices made in inappropriate for the jury to hear evidence on the issue of classwide average resale damages. While plaintiffs' expert was not allowed to testify in terms of dollar amounts, he was allowed to testify in general terms that Rabbits had suffered a statistically significant decrease in resale value. Plaintiffs contend that this ruling amounted to reversible error.

In light of the jury's finding on the defect issue, any error in excluding this testimony was clearly harmless and would not justify granting a new trial.[2] Since the jury answered Issue 1 negatively, and accordingly found that Volkswagen was not

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[2]This circuit recently ruled that the Magnuson-Moss Warranty Act will not support an implied breach of warranty action against an automobile manufacturer premised upon claims of diminished resale value in the absence of allegations that the plaintiff's vehicle actually suffered from whatever defect produced the drop in resale market value. In *Carlson v. General Motors Corp.*, ___ F.2d ___ (4th Cir. 1989); No. 88-2168 (August 22, 1989), a panel of this court upheld the dismissal of actions by plaintiff class members who alleged damages based solely on the diminished resale value of their diesel equipped General Motors cars. The court reasoned that the concept of "merchantability" in UCC §2-314 "does not encompass consumer expectations that a product will hold its value." Slip op. at 24. This precedent would clearly require affirmance of the evidentiary ruling here contested but for the fact that many of the plaintiffs who alleged damages due to the diminished resale value of their Rabbits also allegedly suffered from excessive oil consumption and oil system failures.

liable, it obviously did not reach the issue of damages. Plaintiffs were thus in no way prejudiced by the exclusion of the proffered expert testimony on damages. Evidentiary errors regarding damages are harmless where special verdict questions regarding liability are determined in a defendant's favor. *See Brown, Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 346-48 (1968), *accord Wright & Miller, Federal Practice & Procedure* §2505.

III.

Finally, we turn to Volkswagen's argument on cross appeal. After the jury returned the special verdict, Volkswagen, at the trial court's invitation, submitted a proposed judgment order. Paragraph 5 of that proposal allowed the defendants forty-five days after the entry of the final judgment to file an application for costs or attorneys' fees. The court's final judgment order awarded costs to Volkswagen but made no provision for considering requests for fees or sanctions. When this fact was brought to the judge's attention, he responded, "you can save your breath on attorney fees. I'm not going to award attorney fees." Consequently no motion for attorneys' fees or sanctions was ever filed.

The decision to impose sanctions or award attorneys' fees generally lies with the district court's sound discretion. *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282 (4th Cir. 1987). We agree with Volkswagen that in this case the trial court abused its discretion by arbitrarily foreclosing any consideration of Volkswagen's request. District courts need not hold hearings or make findings before denying trivial or groundless motions for sanctions where the reasons for the denial are readily apparent on the record. *See Local 232, Allied Indus. Wkrs. v. Briggs & Stratton*, 837 F.2d 782 (7th Cir. 1988). But a motion for fees or sanctions cannot be deemed trivial before it is even presented. We agree with the Fifth Circuit that "[a]t a minimum, the district court must listen to a party's arguments and give reasons for its decision." *Schwarz v. Folloder*, 767 F.2d 125, 127 (5th Cir. 1985). *Cf. Lavay Corp. v. Dominion Federal Sav. & Loan Ass'n*, 830 F.2d 522 (4th Cir. 1987) (district court's dismissal of defendant's motion for sanctions before plaintiffs responded was reversed as premature), *cert. denied*, 108 S.Ct. 1027.

IV.

Accordingly, we affirm the judgment below but remand with instructions to consider such motions for attorneys' fees or

sanctions as either party wishes to file. Further, because we think the trial court's comments regarding attorneys' fees creates at least the appearance that he has prejudged the merits of the issue, we order that this matter be assigned to a different judge on remand.

AFFIRMED IN PART AND REMANDED WITH INSTRUCTIONS.

APPENDIX

1. Were the polyacrylate valve stem seals installed by defendants in the 1976-1979 gasoline Rabbit automobiles defectively designed?

ANSWER: NO

2. If issue one is answered "Yes," did the polyacrylate valve stems render the 1976-1979 gasoline Rabbit automobiles in which they were installed unfit for their ordinary purposes?

ANSWER: _____

3. If issues one and two are answered "Yes," did 1976-1979 gasoline Rabbit automobiles suffer diminished resale value after October, 1979, because of the defects?

ANSWER: _____

5. If issues one and two are answered "Yes," did defendants know when they sold the gasoline Rabbits that they were unfit for their ordinary purposes, and did they fail to disclose the fact

to the purchasers:

(a) Of 1976 models? ANSWER: _____
(b) Of 1977 models? ANSWER: _____
(c) Of 1978 models? ANSWER: _____
(d) Of 1979 models? ANSWER: _____

6. If issues one and two are answered "Yes," did defendants actively and fraudulently conceal the defective design of the valve stem seals from purchasers of the Rabbit automobiles?

ANSWER: _____

7. If issues one and two are answered "Yes," was there any widely available information from which the members of plaintiffs' class should have learned of the defectively designed valve stem seals in the gasoline Rabbit automobiles prior to:

(a) February 21, 1979? ANSWER: _____
(b) February 21, 1980? ANSWER: _____
(c) February 21, 1981? ANSWER: _____

8. If issues one and two are answered "Yes," did defendants know when they sold the gasoline Rabbits that the defects in the valve stem seals were not likely to be manifested within the twelve months or 20,000-mile limit of defendants' limited Warranty?

ANSWER: _____ _____

9. If issues one and two are answered "Yes," did defendants act in reckless disregard of the rights of plaintiffs and their class?

ANSWER: _____

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

September 5, 1989

TO: Charles Robert Watkins, Esq.
Sandra D. Benson, Esq.
Beverly Cooper Moore Jr., Esq.
Bertram Ervin Brown II, Esq.
Daniel Vladimir Gsovski, Esq.
Bynum Merritt Hunter, Esq.
Catherine Caldwell Eagles, Esq.
William F. Womble Jr., Esq.
Robert C. Dortch Jr., Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 87-2688
88-2502

The Court's opinion is enclosed.

[INSTRUCTIONS FOR FILING PETITION FOR REHEARING OMITTED]

JOHN M. GREACAN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
ST-C-85-38

DEADWYLER, HUGH; JOHN ALEXANDER;	)	
MAR ALEXANDER; LOU AMATO;	)	
JOHN ANDERSON; BANWELL, WHITE	)	
& ARNOLD, INC.; DAVID BAUMER;	)	
JOAN BAUMER; VIRGINIA BEITLER;	)	
JACK BERTGES; WAYNE BOWMAN;	)	
EUGENE BROWN; JAMES A. BUNN;	)	
EDWARD CAMPEAU; PETER CHAKALES;	)	
ANTHONY CINCIRPINI; OTIS CLAMPITT;	)	
BURTON COHEN; HOLLIS COHEN;	)	
HARRY COLE; KATHRYN COLEGROVE;	)	
E. W. CRAIG; HENRY CRUZ; NORMA CRUZ;	)	
CHARLENE G. DAHLE; ELKINS DAHLE;	)	
DONALD DAIGLE; MARGARET DAIGLE;	)	
NICHOLAS DEFEO; ROBERT DEL SOLE;	)	
ARLENE DIEHL; THOMAS DUNN;	)	
LORETTA FILITSKE; KEVIN FINDLEY;	)	
JOSEPH FIORENTINO; DON FURNAS;	)	
JUNE GALLAGHER; RAYMOND GATTI;	)	
WESLEY GOODIN; MICHAEL B. GROSS;	)	
BARBARA HAAS; FRANKLIN HAAS;	)	
SHARI HAAS; DONNA HAMMOND;	)	
HAROLD HARRIS; ALBERT J. HAVRANEK;	)	
SULO HEIKKINEN; TONY HENSON;	)	JUDGMENT
KATHLEEN HOXIE; BETTY HUGHES;	)	
J. D. HUGHES; HANS JORGENSEN;	)	
KEVIN JORREY; JUDITH KAJDER;	)	
R. B. KELLOGG; NORMAN KIRSHNER;	)	
KENNETH KLAMFORTH; MARY E.	)	
KOSTEWICZ; JOAN KOVEN;	)	
VICTOR KRESS; ROBERT KROPKOWSKI;	)	
JOAN LAWLOR; SHARON LEISER;	)	
G. SETH LEYMAN; EDDIE MACHEN;	)	

DEBRA MANGUS; CURT MATTHEWS;)
C. DOUGLAS McARTHUR; DONALD)
McCONNELL; KATHERINE McCONNELL;)
MARK McCUNE; CON McDONALD;)
WILLIAM McDONNELL; MARCIA MILTON;)
STERLING MOFFAT; RALPH MONTGOMERY;)
JAN MOORE; ANN MORROW; GREGG NEMEC;)
JAN NEMEC; LINDA NOLKER; PAMELA)
HALL O'CONNOR; STUART H. ORKIN;)
BERNADETTE O'SHEA; DANIEL O'SHEA;)
KENNETH PARKER; MORRIS PARKER;)
R. W. PATTON; ELEANOR PETTIS;)
ROBERT PLACIOUS; THERESA POPROCKY;)
BARBARA POUNDERS; ORVAL RADER;)
JOHN RAIMONDI; FRANCES REICHMAN;)
ANN ROBERTS; MICHAEL ROBERTS;)
C. WAYNE ROBINSON; JOHN ROBSON;)
RICHARD ROLF; DALTON ROSE;)
BEVERLY ROSS; CHARLOTTE ROWELL;)
WILLIAM ROWELL; DENNIS SCHMIDT;)
LINDA SHELTON; RICHARD SHIRK;)
TONY SMALL; BOBBY SMITH; EDWARD)
SMITH; JEAN SMITH; FRANK SNIPES;)
ELMER STUMPF; NICHOLAS TAVANI;)
MARGARET THOMPSON; WILLIAM)
TRAUTMAN; HARRY TURNER; KENNETH)
VARGO; MARY VARGO; DONALD G.)
VESTAL; JILL VORAN; MARK)
WADSWORTH; GEORGE WEST;)
W. D. WHITE; SUZANNE WILLIS;)
ALBERT WOOD; JOHN WOOLEY;)
PATRICIA WOOLEY; HERMAN YARD;)
ANDREW YOUNG; STEVEN R. BAER;)
GERI-ALLEN BAER; DWIGHT BALL;)
STEPHEN BENNETT; ELLEN J. BOYCE;)
DAVID BURDETTE; RICHARD N. DECKER;)
TERESA DIAMOND; STEVEN NEWPOL;)
JOSEPHINE FITZPATRICK; TIMOTHY)
FITZPATRICK; HARRY FOX; SARAH H.)

JACKSON; LESLIE A. KENT; RUTH LEVIN;)
JEROME LEVIN; KEVIN L. MARTIN;)
EUGENE MONAY; BARBARA MONAY;)
DONALD L. PATTERSON; PATRICIA K.)
PEARL; TED J. PLOTT; SANDRA R. PLOTT;)
VALERIE QUINN; PATRICK RAVIOLA;)
THOMAS SHAFFER; STEPHEN SHELLEY;)
MARTIN SHERMAN; NANCY SHERMAN;)
NICK STARKOVSKY; LUCIA STARKOVSKY;)
PHILIP SYMONDS; KATHERINE THOMAS;)
and JAMES WILLIAMSON,)

Plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC. and
VOLKSWAGENWERK, AG,

Defendants.

Plaintiffs, individually and on behalf of all others similarly situated, filed this class action against defendants Volkswagen of America, Inc. and Volkswagenwerk, AG on February 21, 1985.

On July 1, 1985, twenty-six additional plaintiffs filed a motion to intervene. The court allowed the motion on July 16, 1985.

Plaintiffs filed a motion for class certification on November 26, 1985. On March 7, 1986, the court certified the class and

entered a class action order. On April 7, 1986, the court approved a class action notice.

The defendants petitioned the Fourth Circuit Court of Appeals for writ of mandamus. On May 2, 1986, the Circuit Court stayed further proceedings in the case. On October 9, 1986, the Circuit Court denied the petition for writ of mandamus and dissolved the stay.

On February 11, 1987, the Court entered a revised class action order and certified the following three classes;

I. MAGNUSON-MOSS IMPLIED WARRANTY "FAILURES" CLASS

> This class includes, except as noted below, all owners of gasoline-powered Volkswagen Rabbits manufactured between July 5, 1975, and April 1, 1979 (the "class period"), who, while the mileages on their cars were between 10,000 and 80,000, and while the cars were equipped with polyacrylate valve stem seals, incurred unreimbursed expenses for excessive oil consumption or for repairs of engine damage caused by excessive oil consumption, or both, in an amount not less than $25.00. These class members contend that excessive oil consumption and engine damage accompanying excessive oil consumption were the result of the failure of the defendants to comply with their implied warranty. They further contend that

defendants' failure caused the cars to be not fit for the ordinary purposes for which automobiles are used.

Excluded from this class are those persons who purchased new or used ("second hand") Volkswagen Rabbits in California (and who resided in California and who registered their Rabbits with the California Department of Motor Vehicles between May 7, 1976, and May 1, 1979), Alabama, Arizona, Connecticut, New York, Wisconsin, Idaho, Illinois or Washington. Also excluded are persons who purchased used Volkswagen Rabbits in Georgia or Oregon.

II. MAGNUSON-MOSS IMPLIED WARRANTY DIMINISHED RESALE VALUE CLASS

This class includes, except as noted below, owners of gasoline-powered Volkswagen Rabbits manufactured between July 5, 1975, and April 1, 1979 (the "class period"), and equipped with polyacrylate valve stem seals, who

(a) purchased the cars new or
(b) purchased the cars used ("second-hand") before the time (October, 1979, or such date in that general vicinity as may be established at trial) when the retail market had discounted the value of such automobiles because of their engine failure or excessive oil consumption problem, or both,

and who sold the cars after the resale market discounted their value but within six years of the original retail sales of the cars. These class members allege that defendants' failure to comply with the implied warranties caused the excessive oil consumption and engine failure problems, and that these problems caused the cars to be unfit for the ordinary purposes for which automobiles are used. These members further contend that as a result of the cars not being fit for the ordinary purposes for which automobiles are used, their Rabbits lost resale value relative to comparable cars not having the excessive oil consumption/engine failure problems, in an amount not less than $25.00.

Excluded from this class are those persons who purchased new or used ("second hand") Volkswagen Rabbits in California (and who resided in California and who registered their Rabbits with the California Department of Motor Vehicles between May 7, 1976, and May 1, 1979), Alabama, Arizona, Connecticut, New York, Wisconsin, Idaho, Illinois or Washington. Also excluded are persons who purchased used Volkswagen Rabbits in Georgia or Oregon.

III. PENDENT UNFAIR OR DECEPTIVE TRADE PRACTICES CLASS

This class includes, except as noted below, all owners of gasoline-powered Volkswagen Rabbits manufactured between July 5, 1975, and April 1, 1979 (the "class period"), and equipped with polyacrylate valve stem seals. These class

> members contend that these cars were defective; that defendants knew the cars were defective or were likely to be defective; that defendants did not inform the purchasers of the defect or the likelihood of defectiveness; and that this behavior constitutes an unfair or deceptive trade act or practice.
>
> Excluded from this class are those persons who purchased new or used ("second hand") Volkswagen Rabbits in California (and who resided in California and who registered their Rabbits with the California Department of Motor Vehicles between May 7, 1976, and May 1, 1979), New York, Nevada, Iowa, Arizona, Georgia, Maine, Michigan, Pennsylvania, Texas, Oregon or Wyoming.

(Revised Class Action Order, February 11, 1987, Docket #366)

On February 11, 1987, the Court also approved a class action notice and directed that the notice be sent immediately by first class mail to members of the certified classes.

A jury trial began on June 1, 1987. On June 18, 1987, the Court submitted the issues to the jury and the jury retired to deliberate. On June 19, 1987, the jury returned a verdict in favor of the defendants. The jury answered the issues as follows.

[OMITTED HERE ARE THE SPECIAL JURY INTERROGATORIES AND ANSWERS THAT ARE ALREADY REPRODUCED AT 16a-17a IN THE APPENDIX TO THE OPINION OF THE COURT OF APPEALS]

On the basis of the foregoing, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the named plaintiffs, the intervening plaintiffs, and the members of the classes shall recover nothing from the defendants.

2. That in accordance with Federal Rule of Civil Procedure 23(c)(3), the court finds the members of the class to include those persons described in the classes certified by the court, who received the class action notice and who did not request to be excluded from the suit.

3. Defendants will recover their costs, to be taxed by the clerk.

4. No attorneys' fees will be awarded.

This 12 day of November, 1987.

/s/ James E. McMillan
James B. McMillan
United States District Judge